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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 77-1353

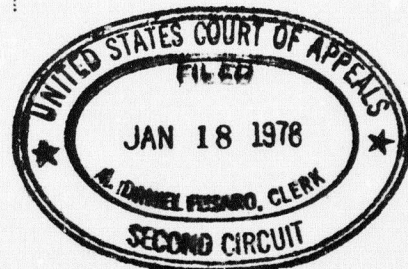
IN RE GRAND JURY SUBPOENA DIRECTING EDWARD
TAYLOR TO APPEAR AND TESTIFY BEFORE A GRAND
JURY ON JULY 20, 1977 at 10:00 A.M.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING

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United States Attorney
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PRELIMINARY STATEMENT

The Government hereby petitions for rehearing of this Court's judgement entered December 12, 1977, reversing an order of the district court enjoining appellant Taylor from retaining William Erlbaum as his attorney in connection with his appearance before a Federal grand jury.

The facts of this case are set forth in our original brief (pp. 1-5) and in the Court's opinion (slip op. 660-661),^{*/} which we annex hereto.

REASONS FOR GRANTING THE PETITION FOR REHEARING

1. As Chief Judge Kaufman observed in his concurring opinion (slip. op. 675-676), the majority opinion is all dicta except for its holding that the district court's order was premature. The Chief Judge further observed (slip op. 676) that "it would be the better part of wisdom not to offer his advisory opinion on an issue of such great importance."

Despite the fact that much of the majority's opinion is dictum, its various pronouncements will almost certainly be followed by the district courts. The opinion, moreover, makes law in a number of critically important areas, including the use of in camera materials and the nature of the public interest (characterized by the majority as insignificant) in eliminating conflicts of interest caused by multiple representation of grand jury witnesses. Indeed, the majority opinion goes so far as to state that a witness' waiver of his right to conflict-free counsel in these situations is always dispositive, no matter how clear the conflict or how obstructive to the grand jury investigation (slip op. 672-673). This language is an improper

^{*/} The grand jury's authority to investigate has recently expired. However, another grand jury has been empanelled to continue the investigation. In substance, therefore, the recent expiration of the grand jury's authority has not affected the interests of the government, Mr. Erlbaum or any of his clients with respect to the issue of Erlbaum's disqualification. In our view the issue has clearly not been mooted. See Pennsylvania v. Mimms, U.S. _____, No. 76-1830, decided 12/5/77, slip op. 2-3 at n.3.

extension of the Sixth Amendment waiver doctrine at trial to the grand jury setting, where the balancing of interests test appropriate to due process inquiries warrants some concern for the public interests affected by conflicts in representation. No court of appeals which has ruled on the disqualification of conflict-laden counsel in the grand jury setting has gone so far as to proclaim that a court has absolutely no power to disqualify counsel when there is a "waiver". To the contrary, the other circuits have either squarely rejected such a view^{*/} or indicated that, under certain circumstances, disqualification orders might be appropriate.^{**/}

We submit that these far-reaching issues should not be resolved by way of an advisory opinion, in which no active judge concurs. As Chief Judge Kaufman observed (slip. op. 676): "Where an issue is not ripe for review, we should not prejudice cases yet to be brought." See Stovall v. Denno, 388 U.S. 293,

^{*/} E.g., United States v. Gopman, 531 F.2d 262 (5th Cir. 1976); In re Investigation Before the February 1977 Lynchburg Grand Jury, ____ F.2d ____ (4th Cir. Oct. 6, 1977).

^{**/} E.g., In re Investigation Before April 1975 Grand Jury, 531 F.2d 600 (D.C. Cir. 1976); In the Matter of the Grand Jury Empanelled January 21, 1975, 536 F.2d 1009 (3rd Cir. 1976).

301 (1967) ("constitutional adjudications [should] not stand as mere dictum"). ***/ Moreover, because so of the majority opinion is little more than dictum, the case seems ill-suited to en banc consideration. Under these circumstances, we respectfully ask that the panel reconsider the broad language unnecessary to its decision. See United States v. Cannone, 528 F.2d 296 (2d Cir. 1976); United States v. Jarvis, 560 F.2d 494 (2d Cir. 1977), where petitions for rehearing or rehearing en banc succeeded in eliminating broad language, making new law, from opinions of this Court. (We note that the final published opinions do not reflect that the original opinions were changed as a result of petitions for rehearing).

***/ As we read Chief Judge Kaufman's concurring opinion, he did not join in the majority's conclusion that, in the event of a waiver, a court has no power to issue a disqualification order. It is not unlikely, however, that it will be argued in future cases that the Taylor opinion was unanimous with respect to that issue since Chief Judge Kaufman, in taking issue with the majority opinion, refers explicitly only to his decision not to join in the discussion on prosecutorial secrecy. If Chief Judge Kaufman -- the only active judge on the panel -- had specifically branded as "dictum" the majority's extreme view concerning the finality of a waiver, there would be less chance that district courts would feel obligated to follow that view as the law of the circuit.

2. These important principles of sound appellate adjudication aside, we respectfully submit that the majority opinion is erroneous in several aspects. While we do not wish to burden the panel with a lengthy rehashing of our original argument, we include the following discussion to show that the issues involved in this case are close as well as important. With respect to points B and C (infra), we suggest that it is therefore particularly inappropriate to resolve such issues in an opinion that is largely dictum.

A. We submit that the Court here erroneously held that the case is not ripe for review until Taylor has formally been offered immunity, the Executive Officer has approved the immunity and Taylor refuses to testify (slip op. 664). We submit that we are not obligated to offer Taylor immunity unless he seeks independent counsel; there is considerably less chance that he will testify freely while represented by Mr. Erlbaum rather than by an independent attorney (although we recognize that, even in the latter instance, he

may not "cooperate"). ^{*/} Moreover, ripeness should not turn

^{*/} As we have argued, if Mr. Erlbaum advises Taylor to act in a way that may well serve Taylor's best interests -- to testify freely, perhaps actually to seek immunity or to cooperate with the government in other ways -- the best interests of Mr. Erlbaum's other clients will probably be adversely affected. (This conclusion is reinforced by the in camera materials, including the testimony of a grand jury witness clearly indicating that the witness was a victim of criminal schemes perpetrated by Taylor and, particularly, Mr. Erlbaum's other clients.) On the other hand, if Mr. Erlbaum advises Taylor to maintain silence to whatever extent possible and to avoid full disclosure or "cooperation", he may well be acting against Taylor's best interests. In such situations a lawyer's obligation to give zealous protection to his clients as a group can easily preclude the fullest protection for a single client and even lead to a collective decision to "stonewall it". Moreover, even apart from any advice which Mr. Erlbaum may give him, Taylor is bound to be inhibited in his dealings with the grand jury because he knows that he can hardly avoid discussing his testimony with Mr. Erlbaum, who represents several targets of the investigation and therefore is obligated to discuss with them all relevant factors, including Taylor's conduct. A witness in Taylor's position will be substantially less likely to testify freely than one who, having independent counsel, knows his actions before the grand jury will not be revealed by his attorney to the targets. A witness such as Taylor would naturally suspect that his attorney would reveal to target-clients not only the fact that the witness has testified, but also the substance of that testimony. If Taylor asserts his privilege against self-incrimination and then is given immunity, his attorney will surely be aware of whether he chose to testify or place himself in contempt. Indeed, a witness in Taylor's position may fear that he is unable to obtain independent counsel without bringing suspicion on himself. (Nor are these problems eliminated by the fact that Taylor does not have to discuss with Mr. Erlbaum his dealings before the grand jury. A court should discourage situations whereby a grand jury witness, because of fears arising from multiple representation, cannot freely communicate with his lawyer.)

on whether immunity has been "formally" as opposed to "informally" given. Such a distinction exalts form over substance. The fact remains that the government is prepared to offer immunity to Taylor, in exchange for his testimony, if he gets a new lawyer, In the Matter of the Grand Jury Empanelled January 21, 1975, supra, 536 F.2d at 1011; that Taylor's role in the criminal activities is apparently different (and lesser in degree) than that of the other targets; and that the sworn testimony submitted in camera shows (unless discredited by the targets' general and self-serving denials that they are aware of any criminal activity on their part) that Taylor has information which will pit him against Mr. Erlbaum's other clients. Even if the government had not discussed with Mr. Erlbaum any possible immunity for Taylor, multiple representation would still be conflict-laden (as the majority opinion itself seems to recognize, slip op. 671, n. 6) since Erlbaum, by simply seeking immunity to protect one or more clients, would be acting against the interests of the others. Moreover, contrary to the majority opinion (slip op. 671, n.6), the fact that the government has "taken the initiative" and informed Taylor that it plans to offer him immunity does not mean that there is no longer

any unperformed duty owed by Mr. Erlbaum to Taylor. In addition to Mr. Erlbaum's arguable duty to encourage Taylor to testify freely in return for immunity, Mr. Erlbaum still has a duty to consider seeking transactional immunity for Taylor (a duty which an independent lawyer could try to fulfill without fears that he was dis-serving his other clients).

More importantly, "ripeness" should not turn on whether or not Taylor has refused to testify. We suggest in this regard that the majority opinion did not fully describe the government's position when the court stated (slip op. 663-664):

[The Government] contends *** that judicial interference with private arrangements for representation by one attorney of two or more grand jury targets is warranted because the progress of the Government's investigation will be threatened if an attorney in the position of Mr. Erlbaum advises a witness to assert his privilege not to testify under all circumstances, even after he is offered use-immunity. [Emphasis supplied]

This language seems to assume (slip op. 664-669), erroneously in our view, that multiple representation does not threaten to obstruct an investigation unless a witness

asserts his privilege against self-incrimination and, after he is immunized, faces confinement for contempt rather than testifying. But there are other ways (in addition to a refusal to testify) in which the chilling effect of multiple representation on a witness such as Taylor can impair an investigation. The witness, though testifying, may decide to give incomplete answers concerning the criminal activities of the main "targets", and we may never know whether he is withholding information or testifying freely. Similarly, the witness may claim not to remember certain events. Or he may lie about what actually occurred.^{*/}

The investigation could also be impaired if, prior to Mr. Erlbaum's disqualification, we call Taylor to testify now to see what happens. If Taylor testifies but withholds information, or claims not to remember, or lies, he may freeze himself into a position which will diminish the likelihood of candid disclosures in the future. Additionally, if Taylor testifies prior to Mr. Erlbaum's disqualification, there is a likelihood that Erlbaum, and therefore his other clients, would be alerted to the transactions under investigation. There is no need to risk such

^{*/} Contrary to the majority's suggestion (slip op. 674), a perjury prosecution is often not a desirable solution in these cases. The government's main interest is to further the grand jury investigation by gathering information about Podell, Simon, and Joseph; by comparison, the government has less interest in spending its resources in a perjury trial against Taylor, although such a trial could conceivably occur as a result of supervening events.

an obstruction of the grand jury process here, where the government has already demonstrated to Taylor the broad contours of the conflict, and has substantiated its assertions with grand jury testimony submitted privately to the court.

In sum, it is prior to Taylor's decision regarding his response to grand jury questions that the public interest in separate independent counsel for Taylor is greatest. The conflict exists now, and it is at this time -- when Taylor's incentive to testify freely is probably the strongest -- that Taylor should be able to have independent counsel, so that he can decide what to do, on the basis of conflict-free advice, without the inevitably intimidating effect of knowing that the lawyer in whom he confides will discuss Taylor's conduct with his other clients, the targets, in order to give full protection to them.

B. We also submit that the court erroneously suggested that there is an insignificant public interest in removing Mr. Erlbaum from Taylor's representation. As we discussed above, the obstructive effect (which may or may not be provable in a particular case) on a grand jury investigation is inherent in any situation where the lawyer of a witness (particularly one who can choose to receive immunity) also represents targets, especially in organized

crime cases where the targets often supply a common lawyer. Nor does the fact that the targets of the investigation might apply "pressure" to Taylor in any event (and that Taylor is free, if he chooses, to discuss his grand jury testimony with anyone) establish that the conflict of interest here does not threaten to obstruct the investigation (see slip op. 667, no. 4). The critical factor is that, with independent counsel, Taylor would know that at least he has a meaningful option to keep his grand jury dealings concealed from the targets of the investigation. With this option available, there is a substantially greater chance that Taylor would decide to cooperate freely.

Nor, in our view, was the majority here correct in concluding (slip op. 675) that the elimination of conflict-laden counsel is not a proper mechanism to encourage free disclosure since the government "should rely on the tools with which it has been provided by Congress -- immunity, contempt, and prosecution for obstruction of justice and perjury [footnote omitted]." The availability of these statutory mechanisms -- which are inherently less effective when, as here, there is a conflict of interest -- underlines the Congressional determination as to the importance of the grand jury's investigative powers, a determination that is

supported and amplified by numerous Supreme Court decisions. The existence of another device --the disqualification of counsel where there is a conflict --is entirely consistent with traditional notions concerning the importance of encouraging full disclosures to a grand jury. Surely, it would be unwise, as well as contradicted by precedent (e.g., Govt's Brief, p. 18), to hold that the statutory mechanisms enumerated by the court of appeals are exclusive, and that a court, in exercising its supervisory power over the bar and grand jury proceedings, has no right to eliminate an unseemly and obstructive conflict of interest in representation.

The majority's opinion also fails to reflect a proper appreciation of the effect of multiple representation in these situations on the reputation of the grand jury process. In observing that there is no problem of this kind here, the court of appeals (slip op. 672) relied on Disciplinary Rule 5-105(c), which provides that "[a] lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each ***" [emphasis supplied]. We fail to see how it is "obvious" that Mr. Erlbaum can adequately represent Taylor (a concept that implies a full and zealous representation) when he is

simultaneously obligated to targets against whom Taylor, in return for immunity, will be asked to testify -- and when another grand jury witness has already given testimony indicating that Taylor's testimony, if truthful, will implicate the main targets.

C. We finally submit that the opinion of the court of appeals wrongly asserts that the government's interest in the secrecy of the in camera materials is "minimal" even during an active investigation as here. The majority opinion states, in effect, that the government has conceded that, in questioning Taylor before the grand jury, we would "reveal to him the same information that has been revealed to the court in camera" (slip. op. 667). Contrary to the majority's suggestion (slip op. 667-668), the government, in questioning Taylor before the grand jury, would not necessarily have to reveal to Taylor the source of the secret testimony, its precise nature or its full scope. */

*/ In our Brief (p. 19, n.21) we argued, with respect to the ripeness issue, that it would be imprudent here to delay a disqualification order until after Taylor testifies since such a course of action would "alert" Mr. Erlbaum and his other clients to the allegations under investigation -- i.e., the evidentiary background of the charges contemplated against them. (This projected consequence was based on the assumption that appellant would still be represented by Mr. Erlbaum at the time of his testimony.)

And, most importantly, there is a substantial chance that Taylor, following Mr. Erlbaum's disqualification, would choose not to reveal to the targets what transpired during his questioning.

This is not a case in which testimony relevant to guilt or innocence at trial is being kept under seal (see slip. op. 665-666). Indeed, once Taylor is immunized and testifies, the prospect of his conviction or incarceration is remote. ^{*/} Nor should the government have to prove "conclusively" at this point (slip op. 668) that Taylor's testimony will pit him against Podell, Simon and Joseph. The informal offer of immunity to Taylor, along with the specific and detailed allegations contained in the sworn testimony submitted in camera, are sufficient to justify a disqualification order now.

^{*/} As we have argued, the effect of the district court's order on Taylor is that he is to be represented, if he chooses, by some able lawyer other than Mr. Erlbaum.

CONCLUSION

The petition for rehearing should be granted.

Dated: Brooklyn, New York
January 16, 1978

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York

HARVEY M. STONE
Assistant U.S. Attorney
(Of Counsel)

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 301—September Term. 1977.

(Argued November 7, 1977 Decided December 12, 1977.)

Docket No. 77-1353

In Re Grand Jury Subpoena Directing EDWARD TAYLOR
to Appear and Testify Before a Grand Jury on July
20, 1977 at 10:00 A.M.

Before:

KAUFMAN, *Chief Judge*,
SMITH and ANDERSON, *Circuit Judges*.

Appeal from an order of the United States District
Court for the Eastern District of New York, Henry
Bramwell, *Judge*, enjoining appellant from retaining Wil-
liam Erlbaum, Esq., as his attorney in connection with his
appearance before a federal grand jury.

Reversed and remanded.

WILLIAM M. ERLBAUM, Esq., Kew Gardens, N. Y.
(Lyon & Erlbaum, Kew Gardens, N. Y., on
the brief), *for Appellant Edward Taylor*.

HARVEY M. STONE, Assistant U. S. Attorney,
Eastern District of New York (David G.
Trager, U. S. Attorney, Eastern District of
New York, on the brief), *for Appellee*.

ANDERSON, *Circuit Judge*:

This is an appeal from the order of the United States District Court for the Eastern District of New York, Bramwell, *Judge*, prohibiting appellant, Edward Taylor, from retaining William Erlbaum, Esq., as his attorney in connection with a grand jury subpoena. The order was issued after the court's *in camera* examination of an affidavit and exhibits submitted by the Government attorney, who is directing the grand jury investigation. The affidavit and exhibits, sealed by the court's order, allegedly establish that a conflict exists between Mr. Erlbaum's representation of appellant and of other targets of the investigation.

The facts of the case are uncomplicated. On July 18, 1977, appellant was served with a subpoena to appear and testify before a grand jury investigating possible federal offenses related to the organization, construction, and operation of direct-lease day care centers in New York City. He retained Mr. Erlbaum to advise him in connection with his grand jury appearance, which was scheduled for August 3.

On July 29, the Government moved for an order disqualifying Mr. Erlbaum on the ground that there was a conflict of interest in his representation of appellant and of Gary Joseph, Jeffrey Podell, and Leonard Simon, the other suspects. The Government stated that, based on other evidence already presented to the grand jury, it was aware that appellant possessed knowledge that would incriminate these men and that it was prepared to seek use-immunity for Taylor and compel him to testify before the grand jury. The Government refused to disclose to Mr. Erlbaum and to appellant, Taylor, the underlying basis of the alleged conflict of interest on the ground that to do so would violate the secrecy of the grand jury proceedings.

Rule 6(e), F.R.Cr.P. Instead, the Government asked the court to review *in camera* certain materials already before the grand jury which would demonstrate the conflict and the need for independent counsel.

At a hearing before the court on July 29, Mr. Erlbaum requested that he and appellant be apprised of the undisclosed *in camera* material in order to allow appellant to make an informed choice of counsel. Mr. Erlbaum stated that Messrs. Taylor, Joseph, Podell, and Simon were related by business and family ties, that he had been appellant's family lawyer for many years, that he had represented these men in connection with an investigation by the New York City Department of Investigations of day care centers, and that he was not aware of any facts that would demonstrate that appellant's interests were antagonistic to those of his other clients. Taylor twice expressed to the court his desire to retain the services of Mr. Erlbaum, unless it was made clear that his (Taylor's) testimony would be in conflict with the interests of his associates.

After examining the Government documents *in camera* as requested, the court advised Taylor that, when called before the grand jury, he would be asked questions which would implicate others, as well as himself, in the alleged criminal activities. It appears that the court's remarks to appellant that the Government exhibits had convinced the court that if appellant answered the grand jury's likely questions truthfully, under a grant of immunity from the Government, he would be required to incriminate Mr. Erlbaum's other clients. Because of this potential conflict, the court prohibited appellant from retaining Mr. Erlbaum as his attorney.

The issue on appeal is whether or not the district court's *in camera* inspection of Government documents and subse-

quent order violated Taylor's constitutional right to counsel of his choice.¹

Although grand jury investigations are not criminal proceedings, the procedure that this court has established for adjudicating the propriety of a lawyer representing multiple criminal defendants provides a useful framework for discussing the rights of two or more persons, subpoenaed as witnesses to testify before a grand jury or who are themselves under grand jury investigation, who choose to retain the same lawyer. This court has held that when a potential conflict of interest arises, before, at, or during the trial of several defendants who have retained the same attorney, the trial court should conduct a hearing to determine whether there exists a conflict which would prevent the accused from receiving the kind and quality of legal advice and assistance that is guaranteed by the Sixth Amendment. *Abraham v. United States*, 549 F.2d 236 (2d Cir. 1977). The defendant should be fully apprised of the facts underlying the potential conflict and should be given the opportunity to express his views.

¹ The Supreme Court has held that a witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by counsel. *In re Groban*, 352 U.S. 330 (1952). Counsel may, however, wait outside of the grand jury room; and, at any and all times during questioning, a witness may leave the room to consult with his attorney. *United States v. Mandujano*, 425 U.S. 564 (1976); *United States v. Capaldo*, 402 F.2d 821 (2d Cir. 1968), cert. denied, 394 U.S. 959 (1969); cf. Rule 6(d), F.R.Cr.P. This accommodation between the investigatory role of the grand jury and the right of a witness to enjoy the advice of legal counsel necessarily implies that counsel assisting the witness be the counsel of his choice. To impose counsel upon a witness against his will or arbitrarily to forbid him from retaining a particular attorney unnecessarily obstructs his ability to enter private contractual arrangements for representation and would deprive him of his constitutional right to due process of law. See *NCK Org'n Ltd. v. Bregman*, 542 F.2d 128, 135 (2d Cir. 1976); *Hull v. Celanese Corp.*, 513 F.2d 568, 572 (2d Cir. 1975); cf. *United States v. Sheiner*, 410 F.2d 337 (2d Cir.), cert. denied, 396 U.S. 859 (1969); *United States v. Plattner*, 330 F.2d 271 (2d Cir. 1964); *Carter v. Illinois*, 329 U.S. 173 (1946).

United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976). Although two or more defendants are not entitled to have the same lawyer as a matter of right, *Abraham v. United States*, *supra*; *United States v. Bernstein*, 533 F.2d 775 (2d Cir.), *cert. denied*, 429 U.S. 995 (1976); each suspect or accused may knowingly and intelligently waive any claims which might arise from counsel's conflict of interest. *United States v. Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975).

In this case, however, the Government asserts that the public's interest in grand jury secrecy and thorough grand jury investigations, precludes the use by the district court of this procedure. First, it contends that because of the importance of preserving grand jury secrecy, the court must dispense with a hearing at which appellant will be fully apprised of the facts underlying the alleged conflict so that he can properly determine the existence of disqualifying interests on the basis of the grand jury testimony and the Government affidavits submitted *in camera*. Second, the Government argues that the appellant cannot waive his right to conflict-free counsel and proceed with Mr. Erlbaum as his attorney. The purpose of the Government's motion to disqualify Mr. Erlbaum is not to protect appellant's right to counsel, but rather to promote the public's interest in an effective, thorough grand jury investigation. See *In re Gopman*, 531 F.2d 262 (5th Cir. 1976); *Pirillo v. Takiff*, 341 A.2d 896 (Pa. 1975), *appeal dismissed and cert. denied*, 423 U.S. 1083 (1976); cf. *Matter of Grand Jury Empaneled January 21, 1975*, 536 F.2d 1009 (3rd Cir. 1976). It contends, therefore, that judicial interference with private arrangements for representation by one attorney of two or more grand jury targets is warranted because the progress of the Government's investigation will be threatened if an attorney in the position of

Mr. Erlbaum advises a witness to assert his privilege not to testify under all circumstances, even after he is offered use-immunity. In effect, the Government is attempting to bring about the compulsory disqualification of Attorney Erlbaum as a tactical maneuver to compel the appellant to testify and to prevent what it anticipates will be efforts by the witnesses summoned for the grand jury investigation to "stonewall" the work of the grand jury.²

We are satisfied, however, that the Government's motion to disqualify Mr. Erlbaum and the court's order prohibiting appellant from retaining his services are premature. The evidentiary basis for these actions is insufficient. See *Matter of Grand Jury Empaneled January 21, 1975, supra*; *In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600 (D.C. Cir. 1976). Appellant has not yet appeared before and been questioned by the grand jury; nor has he indicated that he intends to invoke his privilege not to testify on the ground of self-incrimination. There is little or no evidence in the open record which reveals appellant's relationship to Mr. Erlbaum's other clients. Most importantly, he has not formally been offered immunity, pursuant to 18 U.S.C. §6002, in exchange for his testimony. It is only when this stage in the grand jury proceedings has been reached, the Executive officer has approved the offer of immunity, and the appellant refuses on the advice of counsel to answer a proper question, that

² The Government does not claim that the district court would have the power to prohibit appellant Taylor from retaining the services of Mr. Erlbaum at a trial, following the return of a true bill against Taylor by the grand jury, even if a similar conflict of interest was created by the Government's offer to recommend dismissal of charges brought against him in return for his testimony. In these circumstances, the Government concedes that the right of appellant to waive his Sixth Amendment right to effective assistance of counsel would outweigh its interest in securing his testimony at trial.

the issue of Mr. Erlbaum's conflict of interest in continuing to represent appellant will be ripe for a hearing.³

With respect to the Government's first claim, the court's *in camera* examination of the affidavit and grand jury minutes was not justified by the need for grand jury secrecy in this case. *In camera* proceedings are extraordinary events in the constitutional framework because they deprive the parties against whom they are directed of the root requirements of due process, i.e. notice setting forth the alleged misconduct with particularity and an opportunity for a hearing, see *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Boddie v. Connecticut*, 401 U.S. 371 (1971). They can only be justified and allowed by compelling state interests. See *United States v. Bell*, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972). Whenever the legal rights of individuals are to be adjudicated, the presumption is against the use of secret proceedings. Cf. *Hannah v. Larche*, 363 U.S. 420 (1960). *In camera* examination of evidence by a court will not, for example, suffice to sustain a judgment of conviction where the Government, because of a claim of privilege, has failed to disclose to a defendant information which might be material to his defense. See *Jencks v. United States*, 353 U.S. 657

3 Canon 5 of the Code of Professional Responsibility (1975) states that a lawyer should exercise independent professional judgment on behalf of a client. This court has recognized the Code as prescribing appropriate guidelines for the professional conduct of the bar. *NCK Org'n Ltd. v. Bregman*, 542 F.2d 128 (2d Cir. 1976); *Cinema 5. Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976); *Hull v. Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975).

In any situation in which an attorney represents several targets of a grand jury investigation or several defendants in a criminal trial, he has clients with potentially differing and conflicting interests, especially in light of the Government's role in initiating and going forward with the criminal process. Under such circumstances the attorney must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he continues the multiple employment. Ethical Consideration 5-14.

(1957); *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952); *United States v. Grayson*, 166 F.2d 863 (2d Cir. 1948); *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944); cf. *United States v. Reynolds*, 345 U.S. 1 (1953); *In re Oliver*, 333 U.S. 257 (1948). The principal function of the due process clause is to ensure that state power is exercised only pursuant to procedures adequate to vindicate individual rights. See *Wolff v. McDonnell*, supra, at 558. As the Supreme Court stated in *Carroll v. Princess Anne*, 393 U.S. 175, 183 (1968), "The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the process is *ex parte* because the court does not have available the fundamental instrument of judicial judgment: an adversary proceeding in which both parties may participate."

In camera proceedings are used, however, to determine if the Government's assertion of a legitimate privilege in non-disclosure of information will deprive a defendant of constitutional rights; see *United States v. Nixon*, 418 U.S. 683 (1974); *Roviaro v. United States*, 353 U.S. 53 (1957); *United States v. Bell*, supra; or to prevent the frustration of a statutory purpose to limit access to Government papers, see Rule 16(d)(1), F.R.Cr.P.; *Goldberg v. United States*, 425 U.S. 94 (1976); *Dennis v. United States*, 334 U.S. 855 (1966); *Palermo v. United States*, 360 U.S. 343 (1959); *United States v. Pacelli*, 491 F.2d 1108 (2d Cir.), cert. denied, 419 U.S. 826 (1974). In these circumstances, *in camera* proceedings serve to resolve, without disclosure, the conflict between the threatened deprivation of a party's constitutional rights and the Government's claim of privilege based on the needs of public security. See *Alderman v. United States*, 394 U.S. 165 (1969); *United States v. Brown*, 539 F.2d 467 (5th Cir. 1976).

In order to determine, therefore, whether the *in camera* proceeding conducted by the district court afforded appellant all of the process to which he was entitled, the nature of the Government interest must be balanced against the private interests that are affected by the court's action. See *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961). In the present case, the Government's interest in the secrecy of the grand jury minutes in question is minimal. Cf. *In re Investigation Before April 1975 Grand Jury, supra*, at 606-607, n. 11. Appellant does not seek a license to rummage through the Government's files; rather, he seeks a limited and discrete disclosure of the factual basis for the assertion that he will be asked to incriminate his associates and that, therefore, he requires independent legal counsel. For its part, the Government does not intend that this information will never be made known to appellant; nor has it stated that disclosure would pose a danger to the safety of any individual whose identity might be revealed. See *Dennis v. United States, supra*. Instead, the material will be kept secret only as long as appellant is represented by Mr. Erlbaum. Once the court has disqualified Mr. Erlbaum, the Government is prepared to summon appellant before the grand jury and, through its questions, reveal to him the same information that has been disclosed to the court *in camera*. Although grand jury proceedings are conducted in secret, witnesses who appear before it are not sworn to secrecy. Rule 6(e), F.R.Cr.P.⁴ The Government concedes that not only would

⁴ The Government contends that, if appellant is represented by Mr. Erlbaum, family and business pressures will be brought to bear upon appellant to refuse to testify before the grand jury under any circumstances. What the Government fails to acknowledge is that these same pressures are likely to be brought to bear upon appellant to disclose the substance of his grand jury testimony. The targets of the investigation are aware that the Government has sought appellant's testimony

appellant be free to discuss his grand jury testimony with anyone, but also that he could rehire Mr. Erlbaum to represent him at any subsequent criminal proceeding. It is fair to say that the secrecy interest, which the Government seeks to protect through the court's *in camera* proceeding, would obtain only as long as it will take the appellant to reach the door to the grand jury room through which he will leave.

Balanced against this minimal governmental interest are valuable rights of both appellant and Mr. Erlbaum. The *in camera* proceeding deprives them, respectively, of an opportunity to refute the claims made by the Government with respect to Taylor's right to counsel of his choice, *Chandler v. Fretag*, 348 U.S. 3 (1954); *NCK Org'n Ltd. v. Bregman*, 542 F.2d 128, 135 (2d Cir. 1975); *Hull v. Celanese Corp.*, 513 F.2d 568, 572 (2d Cir. 1975); cf. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); *United States v. Arlen*, 252 F.2d 491 (2d Cir. 1958); his right to associate for the purpose of retaining legal representation, *NAACP v. Button*, 371 U.S. 415 (1963); and, the right of Mr. Erlbaum to practice one's chosen profession, *Dent v. West Virginia*, 129 U.S. 114 (1889); cf. *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963); *In re Ruffalo*, 390 U.S. 544 (1968).

The court, in adjudicating their individual rights *ex parte*, is informing appellant that the Government has conclusively shown that he will have to incriminate himself and his associates when questioned by the grand jury, and, therefore, cannot intelligently waive any conflicts brought about by Mr. Erlbaum's representation of him and of the other individuals hereinbefore mentioned, cf. *United States v. Bernstein*, *supra*; and, it is informing

and that it is prepared to offer him immunity in return for information incriminating them.

Mr. Erlbaum that the Government has conclusively shown that his continued representation of appellant for this occasion would be unethical. cf. *Fleischer v. Phillips*, 264 F.2d 515 (2d Cir.), cert. denied, 359 U.S. 1002 (1959).

These significant pronouncements are made in derogation of basic constitutional rights and without the benefit of the enlightenment which accompanies an adversary proceeding. Under these circumstances, the interests of the appellant and Mr. Erlbaum far outweigh those of the Government and render the *in camera* proceedings of the court in this case improper.⁵

With respect to its second claim, the Government has failed to demonstrate that Mr. Erlbaum's representation of appellant poses a threat to the investigative function of the grand jury. Appellant is willing to testify before the grand jury and he and Mr. Erlbaum assert that they can conceive of no situation in which his testimony would be inimical to the interests of Mr. Erlbaum's other clients. Appellant has informed the court that if the grand jury asked him for information which required him to incriminate his associates, he would seek independent counsel.

The court should not assume that unless appellant testifies as the Government predicts, he will be committing perjury. Cf. *In re Oliver*, supra, at 277-278. Neither should the court assume that an offer of immunity will be ineffective to compel appellant's testimony once the inculpatory nature of the information sought is made clear. Cf. *Matter of Grand Jury Empaneled January 21, 1975*, supra; *In re Investigation Before April 1975 Grand Jury*,

⁵ In so holding, the court does not suggest that the material submitted to the district court *in camera*, and now under seal, must be turned over to appellant for inspection. It will be sufficient for the grand jury to summon appellant and put questions to him which may require him to implicate his associates in criminal activity, thereby bringing the conflict of interest issue into sharper focus.

pra. By granting the Government's motion to disqualify
r. Erlbaum before a single question has been asked of
pellant by the grand jury, the court is concluding that
r. Erlbaum's representation of appellant will frustrate
e work of the grand jury. It is unfairly lending the
eight of the court to the Government's efforts to compel
pellant's testimony, regardless of competing personal
terests, through the disqualification of counsel whose
vice to his clients the Government assumes it will not
ke.⁶

6 The Government has called to our attention the recent decision by the Fourth Circuit in the case of *In re Investigation Before the February 1977, Lynchburg Grand Jury*, — F.2d — (4th Cir. Oct. 6, 1977), in which the court affirmed a district court's order of disqualification of counsel for certain witnesses subpoenaed to testify before a grand jury. The facts of that case, however, are readily distinguishable. The two attorneys, Whitehead and Rosen, were barred from representing ten witnesses in a grand jury investigation concerning interstate prostitution, where each witness had invoked the Fifth Amendment. Three of the witnesses and Attorney Whitehead were targets of the investigation and Mr. Rosen was co-counsel.

It was not until *after* the ten witnesses had invoked the Fifth Amendment, that the Government for the second time sought a court order disqualifying the two lawyers. It again informed them as well as the court of its reasons for so doing. *At the request of the witnesses*, the court examined five of them on voir dire, *in camera* and *ex parte*, and concluded that three of the five were invoking their Fifth Amendment privileges unlawfully to protect from incrimination, not themselves, but their attorney, Whitehead, and the other witnesses. These *in camera* proceedings were conducted at the request and for the benefit of the witnesses themselves, rather than at the request of the Government when the court ruled on the motion. The witnesses had filed waivers of any Sixth Amendment rights that they might have to conflict-free counsel. The Court of Appeals affirmed, however, because the waivers had been executed before the witnesses had been made aware that one of the lawyers and at least three of the witnesses themselves were targets of the grand jury investigation, and that there was thereby created a conflict of interest among them. The Court of Appeals further stated that none of the witnesses and neither of the attorneys had informed the court that each witness had been fully advised about the actual consequences of the conflict between his interest and that of the other witnesses and the one lawyer. The court, therefore, found the waivers were void. It declined to pass on whether

The district court is charged with the responsibility of supervising the members of its bar, and its findings will be disturbed only upon a showing of abuse of discretion. *Allegaert v. Perot*, — F.2d — (2d Cir. Nov. 7, 1977) slip op. at 295; *The Fund of Funds Ltd. v. Arthur Andersen & Co.*, — F.2d — (2d Cir. Nov. 7, 1977), slip op. at 271; *NCK Org'n Ltd. v. Bregman, supra*; *Hull v. Celanese Corp., supra*. It is improper, however, for the court, on the basis of an *in camera* examination of Government documents, to impose its view of an attorney's ethical responsibility in a private attorney/client arrangement

Mr. Rosen would still have been disqualified if the waivers had been found to be valid.

Mr. Whitehead's disqualification was affirmed because of his own conflict of interest, as well as to avoid any appearance of unethical conduct, and to prevent a frustration of the grand jury proceeding. Mr. Rosen's disqualification was also affirmed because he would have to act against the interests of some of his clients if he sought immunity on behalf of one of them in exchange for testimony before the grand jury. That situation most closely resembles the case presently before this court. Here, however, such conflict will not arise, because the Government has already taken the initiative and informed the witness Taylor that it plans to offer him immunity from prosecution in order to secure his testimony. At this point, therefore, the record does not disclose that there is any duty owed by Mr. Erlbaum to Taylor or any of his other clients, which he has not performed.

The Government has in no way even suggested that Mr. Erlbaum may be a target of the investigation, whose self-interest in avoiding incrimination would interfere with his ability vigorously to pursue his clients' best interests; nor is there any proof or offer of proof that his representation of appellant will impair the grand jury's investigative function and deprive the public of the testimony of a witness. Cf. *United States v. Calandra*, 414 U.S. 338, 345 (1973).

Moreover, we decline to adopt the Fourth Circuit's position, insofar as it suggests that the proper course for the district courts to take, when faced with witnesses whose recalcitrance may impede the proper functioning of a grand jury investigation, is to disqualify chosen counsel through the exercise of their supervisory power over the proceedings. This court has observed that the "accommodation between the right of the Government to compel testimony, on the one hand, and the constitutional privilege to remain silent, on the other, is the immunity statute." *United States v. Tramunti*, 500 F.2d 1334, 1342 (2d Cir.), cert. denied, 419 U.S. 1079 (1974).

where no compelling public interest has yet been shown. Disciplinary Rule 5-105(c) provides that "[a] lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

When a potential or actual conflict of interest situation arises, it is the court's duty to ensure that the attorney's client, so involved, is fully aware of the nature of the conflict and understands the potential threat to the protection of his interests. Once the court is satisfied, however, that such a client knowingly and intelligently wishes to proceed with joint representation, the court's responsibility is met, and it is without power unilaterally to obstruct the choice of counsel. See *Abraham v. United States*, 549 F.2d 236 (2d Cir. 1976); *United States v. Arredo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975).

In so holding, this court does not shirk its duty of requiring the maintenance of "the highest ethical standards of professional responsibility." *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973). In *Emle Industries, Inc. v. Patentex*, *supra*; *NCK Org'n v. Bregman*, *supra*; and *The Fund of Funds, Ltd. v. Arthur Andersen & Co.*, *supra*, attorneys had run afoul of the strictures of Canon 4 by placing themselves in a position in which the confidentiality of their relationship with former clients was threatened. In those cases the interests in jeopardy were those of the former clients who brought the motions to disqualify because the attorneys had changed sides from the former clients to the current, adverse clients; and, it was proper for the court to adjudicate the conflict in order to avoid even the appearance of impropriety on the part of counsel. Canon 9; see also, *Hull v. Celanese Corp.*, *supra*; cf. *Allegaert v. Perot*, *supra*. In this case, however,

the court, in accordance with Canon 5, is ostensibly concerned with appellant's interest in sound legal advice. A conflict between appellant and his associates is not inherent in their joint representation by Mr. Erlbaum. A clash of interests, if any, has been created by the Government's desire to compel the appellant to give particular testimony before the grand jury. The Government possesses the power to create such a "conflict" in all situations in which targets of a grand jury investigation or defendants at trial are represented by a single attorney. This court has on numerous occasions declined to adopt a rigid "single representation" rule in situations of actual, as well as potential conflict, in favor of allowing a client to retain counsel of his choice with full knowledge of the potential adverse consequences of such representation. *Abraham v. United States*, *supra*; *United States v. Carrigan*, 543 F.2d 1053 (2d Cir. 1976); *United States v. Mari*, 526 F.2d 117 (2d Cir. 1975), *cert. denied*, 429 U.S. 941 (1976); *United States v. Arnedo-Sarmiento*, *supra*; *United States v. DeBerry*, 487 F.2d 448 (2d Cir. 1973); *United States v. Alberti*, 470 F.2d 878 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973); *United States v. Sheiner*, 410 F.2d 337 (2d Cir.), *cert. denied*, 396 U.S. 859 (1969). On the facts of this case, we continue to adhere to that position.

The district court should require the grand jury to proceed with its investigation in the usual course by summoning appellant to testify. If in the course of doing so the appellant invokes his Fifth Amendment privilege, the Government can offer him immunity to compel his testimony. If appellant decides that it is in his best interest to remain silent, face confinement for contempt and possibly a subsequent indictment, rather than become a witness for the Government, and he knowingly and intelligently wishes to continue with Mr. Erlbaum as his counsel, the court must accept that position.

The district court has sufficient power at its disposal to compel a recalcitrant grand jury witness⁷ to obey its order to testify; and the Government is authorized to prosecute persons who seek to obstruct justice by corruptly influencing a grand jury witness⁸ or by suborning perjury.⁹ The

7 28 U.S.C. §1526(a) states that,

"Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such times as the witness is willing to give such testimony or provide such information. No period of confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months."

8 18 U.S.C. §1503 provides, in part, that:

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, . . . or corruptly or by threats or force, or by threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

This statute has been held to encompass efforts corruptly to persuade a grand jury witness to remain silent and invoke the Fifth Amendment under all circumstances in order to conceal evidence of criminal activity. *United States v. Fayer*, 523 F.2d 661 (2d Cir. 1975); *United States v. Cioffi*, 493 F.2d 1111 (2d Cir.), cert. denied, 419 U.S. 917 (1974); *Cole v. United States*, 329 F.2d 437 (9th Cir.), cert. denied, 377 U.S. 954 (1964); see also, *United States v. Schwartzbaum*, 527 F.2d 249 (2d Cir. 1975), cert. denied, 424 U.S. 942 (1976); *United States v. Campanale*, 515 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); *United States v. Marionneau*, 514 F.2d 1244 (5th Cir. 1975).

9 18 U.S.C. §1622 states,

"Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than \$2,000 or imprisoned not more than five years, or both."

principle that an attorney should withdraw from the representation of multiple clients, where his ability to act for one is adversely affected by his representation of others, evolved from a concern for each client's interest in receiving independent professional advice. See Canon 5, Code of Professional Responsibility, American Bar Association (1975). The Government, for its part, should rely on the tools with which it has been provided by Congress—immunity, contempt, and prosecution for obstruction of justice and perjury.¹⁰

We set aside the order of the district court and direct it to dissolve its injunction and dismiss the motion.

KAUFMAN, *Chief Judge* (concurring):

I wholeheartedly concur in my brother Anderson's view that the Government's motion to disqualify Mr. Erlbaum, and the court's order prohibiting the appellant from retaining his services, are premature. In my view, it is highly significant that the appellant has not yet been offered immunity in exchange for his testimony pursuant to 18 U.S.C. §6002. My brother Anderson appropriately indicates it is only when this stage in the grand jury proceedings has been reached, that the issue of Mr. Erlbaum's

10 We have given consideration to Chief Judge Kaufman's concurring opinion in which he expresses the desirability of deciding this appeal solely on the ground that the Government's motion was premature, and that the discussion of the due process issue, implicit in the *in camera* proceeding is, in effect, the rendering of an advisory opinion. In view of the fact that the issues of the propriety of the *in camera* proceedings and the right to counsel of one's choice were as much a part of the case as the question of immaturity, and were fully argued by the parties in their briefs and at oral argument, we remain of the view that in the circumstances of this case the parties are entitled to an answer.

conflict of interest will be ripe for adjudication. See *Matter of Grand Jury Empaneled January 21, 1975*, 536 F.2d 1009 (3d Cir. 1976); *In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600 (D.C. Cir. 1976).

I do not, however, join in Judge Anderson's excellent homily on prosecutorial secrecy and its dangers. My reason is simple. Where an issue is not ripe for review, we should not prejudice cases yet to be brought. We do not know what a new complaint, if and when brought, might allege: the factual averments may be quite different and will surely involve supervening circumstances. Hence, while my brother's zeal to right the wrongs of *in camera* proceedings is entirely commendable, I believe it would be the better part of wisdom not to offer his advisory opinion on an issue of such great importance.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

DOLORES M. BYRD

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 16th day of January 1978 he served a copy of the within

PETITION FOR REHEARING

by placing the same in a properly postpaid franked envelope addressed to:
WILLIAM M. ERLBAUM, ESQ., 123-60 83rd AVENUE, KEW GARDENS, NEW YORK 11415

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this

16th day of January 1978

Juanita Mayo
JUANITA MAYO
Notary Public, State of New York
No. 31-4501911
Qualified in New York County
Commission Expires March 30, 1979